F. M. S. REPORTS.

[ORIGINAL CRIMINAL JURISDICTION]

HORNE, J.

June 5, 1940.

PUBLIC PROSECUTOR

v.

DAVID JOHN WHITE alias ABDUL RAHMAN.

[NEGRI SEMBILAN CRIMINAL TRIAL No. 5 of 1940]

Penal Code, S. 494—bigamy—marriage celebrated according to Christian rites—subsequent conversion of husband to Mohammedanism and marriage to another woman according to Mohammedan law.

A person who enters into a marriage relationship with a woman according to monogamous rites takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of "husband" in a monogamous marriage and he cannot, whatever his religion may be, during the subsistence of that monogamous marriage marry or go through a legally recognised form of marriage with another woman.

The accused married a Christian lady at Taiping, Federated Malay States, in 1918 according to the rites and ceremonies of the Church of England. In 1936 while his wife was still alive, the accused married another Christian lady according to Mohammedan law after they had been converted to the Mohammedan religion. In a prosecution instituted at the instance of the first wife for bigamy.

Held, applying the principle above enunciated, that the first marriage being a monogamous one, the accused had committed the offence of bigamy.

Cases referred to:—

(1) *Hyde v. Hyde,* (1866) L.R. 1 P. & D. 130 at p. 133.

(2) *Nandi,* I.L.R. 1920 Lahore 440.

(3) *Ramah binti Ta'at v. Laton binti Malim Sutan,* 6 F.M.S.L.R. 128.

(4) *Regina v. Rabia,* (1889) 4 Ky. 513.

(5) *Rex v. Davendra,* 1 M.C. 51.

(6) *Rex v. Hammersmith Superintendent Registrar of Marriages,* (1917) 1 K.B. 641.

CRIMINAL TRIAL.

Grattan-Bellew, Deputy Public Prosecutor, for the Public Prosecutor.

Goho, for the Accused.

Horne, J.—The accused David John White is charged with bigamy and has claimed trial. He was married to Birdie Rose Moreira in the Church of All Saints, Taiping, Federated Malay States, on the 28th December, 1918, according to the rites and ceremonies of the Church of England. On the 10th January, 1936, his wife being alive, the accused and Miss Webb were converted to Mohammedanism by Haji Mohamed, the Kathi of Seremban, and thereupon the accused and Miss Webb, having been named Abdul Rahman and Aisha respectively, were married according to Mohammedan law by the Kathi in the presence of witnesses. The accused in his statement from the dock admits the facts.

Section 494 of the Penal Code punishes the offence known as bigamy and is in these terms:—

> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, shall also be liable to fine.
>
> **Exception.**—This section does not extend to any person whose marriage, with such husband or wife, has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts so far as the same are within his or her knowledge."

Mr. Goho, who appears for the accused, has argued that on the facts the accused ought not to be convicted of bigamy. He submits that under Mohammedan law, the second marriage does not become void by reason of its having taken place during the life of the wife of the first marriage: the accused is domiciled in the Federated Malay States and has become a Mohammedan by conversion and has thus acquired a personal law, which personal law allows him to marry contemporaneously as many as four wivies.

Mohammedan law is part of the law of the Federated Malay States and it has been laid down by the Court of Appeal that this Court must propound that law in cases where the same is applicable—*Ramah binti Ta'at v. Laton binti Malim Sutan,*(3). It must also be accepted that the question whether the second marriage is void by reason of its taking place during the subsistence of the first marriage must be decided according to the civil law. As there are several

different bodies of civil law recognised by the Court in the Federated Malay States there is said to arise a conflict of law. It is not suggested that the first marriage does not still subsist; but it is contended that upon conversion the convert is able to do an act which, before his conversion, would have been a crime, but is now not a crime. In my opinion it is not sufficient for the accused to say I am a Mohammedan and consequently the question whether the second marriage is void must be decided solely by Mohammedan law; he must go further and shew that his conduct, so far as it affects the question at issue, has always been governed by that law, and I do not think he is able to do so.

The accused claims domicil in the Federated Malay States. He probably is domiciled, certainly he is resident, and has been living under the law of the Federation for the period 1918 to 1936. That law includes a large body of enactments which may in certain circumstances apply to him whatever personal law apart from the enactments he may claim. He married under the Christian Marriage Enactment in 1918. A marriage celebrated under the Enactment falls within the description given by Lord Penzance in *Hyde v. Hyde,*[1].

> "Marriage has been well said to be something more than a contract, either religious or civil—to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite legal rights upon their offspring."

One of the legal incidents thrown about that status by the laws of the Federated Malay States is that the parties to such a marriage are during its subsistence precluded from marrying anyone else. This incident is not a term of the contract a breach of which can be compensated by damages as was half-heartedly suggested in the course of the argument. This incident is no doubt implicit in the celebration. But as Reading L.C.J. puts it in *Rex v. Hammersmith Superintendent Registrar of Marriages,*[6].

> "Once the marriage has been celebrated according to the law of the place where it is celebrated the status of marriage with all its incidents is conferred by law upon the parties."

We have in the Federated Malay States a law under which such a marriage can be celebrated and when so celebrated it is legally recognised as a valid marriage. Moreover, the prohibition of either spouse marrying another person while such marriage subsists is enforceable by penal sanction. It is also possible in the Federated Malay States for persons to enter into polygamous marriages and acquire the status arising out of such marriages or conferred upon the parties by the law or custom under which such marriages are contracted; and the status and the rights and obligations flowing therefrom are given legal recognition in the Courts of the Federated Malay States as part of the local civil law.

I am therefore bound to hold and so to direct myself that as monogamous and polygamous marriages are recognised by the civil law, a man who enters into a marriage relationship with a woman according to monogamous rites takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of "husband" in a monogamous marriage. He cannot, therefore, whatever his religion may be, during the subsistence of that monogamous marriage marry or go through a legally recognised form of marriage with another woman.

A conversion to another faith of either spouse of such a marriage has no legal effect on the status of that spouse. This is the view taken by Bucknill C.J. (S.S.) in *Rex v. Davendra,*[5]. In that case a Hindu had married monogamously under the law of Ceylon and upon conversion to Christianity married another woman in the Straits Settlements. He was convicted of bigamy. To use Mr. Grattan-Bellow's words, the test is whether a person has put on the cloak of monogamy by the first marriage. A Mohammedan woman by her marriage does so. She is not allowed contemporaneously more than one husband, and in *Regina v. Rabia,*[4] a Mohammedan woman was convicted of bigamy. No question of conversion arose in that case. It was contended that there was no jurisdiction to try a Mohammedan for the offence. This contention was rejected by the Court of Appeal, the judgments declaring that the Penal Code applies to all.

In India a Hindu woman who is also precluded from taking a second husband during the subsistence of the marriage has been convicted of bigamy after conversion to Mohammedanism and marriage to a Muslim male—*Nandi,*[2].

In all these cases the prohibition against taking a second husband derives from the status conferred upon the woman by the law of the marriage. I would apply the same principle to the accused who is also precluded by the law of his first marriage from marrying another woman. His conduct brings him

within the scope of section 494 as did that of the persons convicted in the three cases cited.

But I think I ought to say something about Mr. Goho's contention that the second marriage is not void under Mohammedan law. I do not agree with the submission to that effect. True, up to four wives are permissible. But a marriage between a Moslem and a non-Mosleman celebrated in a foreign country is valid under Mohammedan law if it is performed in accordance with the requirements of the *lex loci contractus* or the rites of the communion to which the wife belongs (*Syed Ameer Ali,* Volume II, page 183). The phrase "celebrated in a foreign country" makes the matter a little difficult. But I can see no difference between a Moslem contracting a monogamous marriage here under the Christian Marriage Enactment (only one party need be Christian) and a Moslem contracting a monogamous civil marriage in France before the civil authority. From an Islamic point of view they are both celebrated in a foreign country. To be valid under Mohammedan law means that the rights of parties thereto can be enforced, that the status acquired will be legally recognised. This is in accordance with the principle of international law whereby a country through its Courts applies the law of a foreign State to the subjects of the latter resident or domiciled within it. Although polygamy is permissible to the Moslems it is far from obligatory. *Syed Ameer Ali,* volume II, page 24, quotes the following from the Koran:—

> "You **may** marry two, three or four wives, but not more"...."but if you cannot deal equitably and justly with all, you **shall** marry only one."

He adds:—

> "The extreme importance of this proviso, bearing especially in mind the meaning which is attached to the word 'equity' (adl) in the Koranic teachings, has not been lost sight of by the great thinkers of the Moslem world."

Further, it is stated in the *Minhaj et Talibin,* Book 33, Chapter 3, Section 1, that "An infidel of whatever religion who is converted to Islam"—a description which fits the accused—"while married to a woman whose religion is founded upon some holy scripture keeps her as his wife."

A system of law demands for wives justice to all (or both as it would be in this case) would not permit a person subject to it firstly to contract a monogamous marriage with one woman and then later to contract a polygamous marriage to another. Under Mohammedan law men and women are on a footing of perfect equality in the exercise of all legal powers and functions (*Syed Ameer Ali,* Vol. II, page 23). If the first marriage is legally valid in Mohammedan law then the application of the principle of equity demands there shall be no further marriage.

Under Mohammedan law in a purely Moslem country there may be no penal sanction for entering upon a second marriage in these imagined circumstances. But the Penal law of the Federation applies to all and it makes no difference whether the marriage is valid under Mohammedan law or not; it is in this case valid in point of form but is void under the civil law of the Federated Malay States for the reason of its having taken place during the life of his wife.

I convict the accused of bigamy.

Accused convicted.